

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 30, 2007

Benjamin F. Walls
SBI #
Delaware Correctional Center
P.O. Box 500
Smyrna, DE 19977

Re: State of Delaware v. Benjamin F. Walls
Def. Id# 0303007019

Memorandum Opinion - Motion for Postconviction Relief

Dear Mr. Walls:

This is my decision on your third motion for postconviction relief. You were convicted of Possession of a Firearm During the Commission of a Felony, Assault in the First Degree, Possession of a Firearm by a Person Prohibited, Muzzle Loader Restrictions and Trespassing. The convictions arose out of an incident where you, while deer hunting on a foggy day, shot a high-powered rifle towards a busy highway, striking an unsuspecting motorist in the head. The Supreme Court of Delaware affirmed your convictions on May 14, 2004. You now claim that the jury instructions on the charge of Assault in the First Degree were incomplete because they did not include “accident” and 11 Del.C. §263 instructions. You also claim that the jury should not have been given the “unavoidable accident” instruction.

You could have raised these claims at trial, but you did not do so. Therefore, they are barred by Superior Court Criminal Rule 61(i)(3). In order to avoid the procedural bar under Rule 61(i)(3), you must demonstrate both “cause” and “actual prejudice.”¹ Therefore, if you cannot demonstrate “cause,” it is not necessary for the Court to consider whether you can demonstrate “prejudice.”² Similarly, if you cannot

¹ *Blackwell v. State*, 736 A.2d 971 (Del. 1999).

² *Shelton v. State*, 744 A.2d 465, 478 (Del. 2000).

demonstrate “prejudice,” it is irrelevant whether you can prove “cause.”³ You must show that “some external impediment” prevented you from raising your claims.⁴ You have not identified any external impediment which prevented you from raising your claims at trial. The fact that you voluntarily did not attend the last day of trial is not an excuse for not raising your claims. Therefore, your claims are barred by Rule 61(i)(3).

The procedural bar of Rule 61(i)(3) can potentially be overcome by Rule 61(i)(5) if there is a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.⁵ “This fundamental fairness exception, as set forth in Superior Court Criminal Rule 61(i)(5), is a narrow exception and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.”⁶ This exception may also constitute a claim that there has been a mistaken waiver of important constitutional rights in exchange for a guilty plea.⁷ You have not raised a colorable claim that there was a miscarriage of justice.

For the Assault in the First Degree charge, 11 Del.C. §613(3), the State’s theory was that your shooting a high-powered rifle towards a busy highway on a foggy day while deer hunting was reckless conduct which created a substantial risk of death to a person traveling on the highway and did, in fact, cause serious physical injury to a person traveling on the highway. The jury instructions covered each element of this offense. “Recklessly” was also further defined for the jury in the instructions. The jury was instructed on “unavoidable accident,” which was a favorable instruction for you. You now argue that

³ *Grosvenor v. State*, 849 A.2d 33, 35 (Del. 2004).

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵ *Jackson v. State*, 1995 WL 439270 (Del. Supr.).

⁶ *Younger*, 580 A.2d at 555, *citing Teague v. Lane*, 489 U.S. 288 (1989).

⁷ *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

you should have had an instruction under 11 Del.C. §263. The substance of such an instruction would have been that the element of reckless causation is not established where the actual result is outside the risk of what you were aware. The evidence established that you shot a high-powered rifle towards a busy highway on a foggy day. That your bullet hit a person driving on that highway was certainly a likely result of your conduct. Moreover, because your conduct was so obviously reckless, an “accident” instruction was not warranted because there was no factual basis in the evidence for it.⁸

There is nothing in your claims that even hints at a constitutional violation which would undermine the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction. Therefore, your motion is barred by Superior Court Criminal Rule 61(i)(3).

Your third motion for postconviction relief is denied.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Peggy J. Marshall, Esquire
John F. Hyde, Esquire
Karl Haller, Esquire

⁸ *Zimmerman v. State*, 565 A.2d 887, 890 (Del. 1989).